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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 6 ORIGINAL

IN EQUITY.

THE STATE OF LOUISIANA, *Complainant,*

versus

THE STATE OF MISSISSIPPI, *Defendant.*

SECOND SUPPLEMENTAL BRIEF OF STATE OF LOUISIANA, COMPLAINANT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 9, ORIGINAL

IN EQUITY.

THE STATE OF LOUISIANA, *Complainant,*

versus

THE STATE OF MISSISSIPPI, *Defendant.*

SECOND SUPPLEMENTAL BRIEF OF STATE OF LOUISIANA, COMPLAINANT.

SYLLABUS

1. The general rule as to boundary lines between States is, that long acquiescence by one State in the actual occupancy of a part of its territory adjacent to another State, by such other State, under a claim or right, and with exclusive dominion and authority over it, with full knowledge of such by the other State, in conclusive of the boundary line between them.

See cases on preceding page.

2. No act affecting real estate shall have any effect against third persons until the same is deposited for re-

cord in the office of the Parish Recorder, of the Parish where such immovable property is situated.

Louisiana Civil Code, Article 2264.

3. All sales of immovable property which shall not be so recorded, shall be utterly null and void except between the parties thereto.

Louisiana Civil Code, Article 2266.

Generally the same rules as to boundary between individuals apply between States.

Rhode Island to Massachusetts, 9 L. Ed., 1233.

4. However, the rule that for a riparian proprietor to own alluvial additions, same must begin at the bank, does not prevent the State of Louisiana from owning islands formed West of the Channel.

5. Where the rightful owner is in the actual occupancy of a part of his tract, he is in constructive possession of the whole, unless some other claimant is in actual possession of some other part of the same tract. Where two persons are in actual possession of different parts of the same tract, each claiming to own the whole, the constructive follows the legal title.

Deputron v. Young, 33 L. Ed., 930.

CLAIM OF DOMINION AND SOVEREIGNTY OF MISSISSIPPI WITH ACQUIESCENCE OF LOUISIANA

Defendant alleged in paragraph six of its answer, that at all times since 1817, said lands have been *claimed* by the State of Mississippi, have been *assessed* with taxes

by the State of Mississippi; *and the owners thereof have at all times recognized the sovereignty of the State of Mississippi thereto.*

This paragraph, taken in connection with the allegation in the same paragraph of the answer, that the land in dispute *has been Mississippi territory since the organization of the State* in 1817, necessarily means that *the Mississippi owners,* or those claiming title under the State of Mississippi, have at all times *recognized the sovereignty of the State of Mississippi.* (This could not bind Louisiana.)

There is an allegation in the same paragraph of the answer that not until a short time before the bringing of this suit, did the State of Louisiana *make any claim to said lands.*

This is true in so far as making any claim *against the State of Mississippi is concerned,* prior to the cut off of 1912, as Louisiana was in the actual occupancy as owner of the land in dispute, without any claim whatever from Mississippi, or any of its citizens, there was no reason why Louisiana should make a claim against Mississippi, or its citizens, for something that Mississippi had never *possessed* or *claimed.*

There is no allegation in the answer that Louisiana, or its citizens have ever recognized the sovereignty of the State of Mississippi, or acquiesced therein.

There is no evidence in the record of any fact which would show that Louisiana recognized the sovereignty of the State of Mississippi over the land in dispute, or in any way acquiesced in its jurisdiction, or had any evidence of a claim of jurisdiction by Mississippi, until Mr.

Etna J. Albrittain, one of those at present claiming ownership, just before this suit was filed, made claim to the land.

The only way the contention that Louisiana has recognized the sovereignty and jurisdiction of Mississippi could have any effect in aiding Mississippi to hold the territory in dispute, would be on the theory that Louisiana had the legal title to the land, but had lost it by permitting Mississippi to occupy the land, and exercise its sovereignty and jurisdiction over same, and by the acquiescence of Louisiana therein for such a great period of time it had estopped itself from claiming said land, or that it had lost same by prescription.

The plea of estoppel by acquiescing in an existing state of facts, is a special defense, and must be pleaded or the courts will not notice such contention.

The same is true of a plea of prescription.

We think, as there are no such pleas in this case, the Court should pay no further attention to same.

It cannot be said that the pleadings have been broadened by the introduction of evidence without objection, as the only evidence that could even remotely be claimed to have such effect is the assessments, tax sales and patents from Mississippi; and these could not have such effect, as they were admissible on other grounds. They were admissible as going to show that Mississippi claimed title to the lands, the rule being that where evidence is admissible on any ground, it does not have the effect of broadening the pleadings, by being introduced without objection.

Complainant submits that special issues require spec-

ial pleas, and cannot be injected into a cause solely in briefs and arguments of counsel, as is attempted to be done in this case.

Let us examine the facts as to dominion, possession and control of the territory in dispute.

To keep the court from getting the facts confused on this particular issue, we call attention to the fact that Scrugg's Island, or Tullos Island, afterwards called Island 98, once existed; that it was under dominion, possession and control of Mississippi and was Mississippi territory. Mississippi contends this island never disappeared, but after washing away considerably, the river ran around it, and it then made by accretion out in the old bed of the river until it connected with the Louisiana shore. If this contention has been established, then Louisiana never had title, and the question of Louisiana losing its title by permitting Mississippi to take and maintain possession and control, could not arise; but if Louisiana's contention that the island entirely washed away, and that the accretions to Louisiana have extended out and over the location where the said island once existed, then there could be no grounds for the contention that Louisiana had lost its title by acquiescing in the possession, dominion and control which Mississippi had taken of this Louisiana secretion, *as it never took any possession of it.*

The question then, on this particular issue, for the Court to decide is:

"Did Mississippi Take Possession and Control of This Accretion, with the Acquiescence of Louisiana?

Let us examine the record for the facts.

Mr. I. B. Beard, (T. B. Beard in Record) said: "I had never heard of any part of this land being claimed by Mississippi *before I was a witness in the case.* (1926.) R. 90.

The Newman heirs were regarded as owners of the property. R. 90.

Mr. Ernest Newman said his family claimed Willow Point and Newman's Towhead. Newman's Towhead got its name from the Newman family; it was considered to belong to his father. "We had cattle running on it—a cattle range on it."

They paid their taxes in Louisiana and paid none in Mississippi. R. 53.

While they paid no taxes on this accretion, it was not assessed.

George R. Newman said the Newman house was *about* 100 *yards* from what he called the main land; *it was outside the levee* next to the river. R. 67.

He never heard of Newman's Towhead or any part of Willow Point being claimed by Mississippi, until since this suit began. R. 70.

No part of Newman's Towhead was in cultivation prior to 1912, the time of the cut-off. R. 72-73.

Lawrence Towns said he knew the Newman place over in Louisiana. * * * "They just calls it *Newman Towhead.*" He leased it from Mr. Learned. R. 224.

His lease was offered in evidence; it was of a tract of land in *East Carroll Parish, La.*, containing about 2000 acres, more or less, being what is now known as *Newman's Towhead, with accretions,* and being a part of the Belle and Willow Point Plantations, in said Parish. R. 226.

He leased from Mr. Learned for six or eight years. R. 226.

This lease was made after the cut-off (1912.) R. 228.

He did not cultivate any part of the Towhead; but dropped some corn in cracks, and it came up and the hogs ate it; he had 800 or 900 head of hogs over there. (On the Towhead.) R. 227.

Mr. Learned leased Towns this property *to keep others off of it* Towns said: "That is what he told me, by word of mouth, *to keep everybody off of it.*" R. 241.

While it is thus shown persons claiming the ownership under Louisiana title, of the property, *had the actual physical possession* and occupancy thereof until a short time prior to the bringing of this suit, there is not a word in the record to show physical possession or occupancy of any of said property, by Mississippi claimants, since Island 98 caved away, about 1893.

It is true that the Newmans had no deed to the Louisiana alluvion formed by accretion, *but they needed none;* they had a deed to the property bordering on the river, and owned the property in dispute as an accession, by virtue of their riparian proprietorship.

The riparian proprietor does not get a new deed from the United States Government, or the State, to the accretions formed by alluvion.

The accretions are *accessory rights,* attaching exclusively to the riparian estate.

The right to these alluvial formations is a vested right, *inherent in the riparian ownership* of the land to which it attaches.

White vs. Leovy, 49 A., 1660.
State vs. Buck, 46 A., 656.

Suc. Delachaise vs. McGinnis, 44 A., 1043.
Meyers vs. Mathis, 42 A., 471.
Municipality No. 2 vs. N. O. Cotton Press, 18 La. 122.

There is no doubt that in the early eighties, about 1882, Tullos Island, or Island 98, which was sometimes called Scrugg's Island, and which was then Mississippi territory, was actually in possession of a man by the name of Scruggs, and that part of it was cultivated and that it had a gin on it, but this possession seems to have been abandoned before the Island all caved away.

There is not a word that complainant can find in the record to show any possession by any one claiming under Mississippi of this island after 1886.

Wm. Miller said Scruggs was on the island in 1886. R. 308.

Mr. Foster said there had been no gin on the island for a long time. R. 211.

The gin was there in 1882. R. 215.

He does not say that he was closer than within two miles of the Island *after* 1882.

Complaintant has shown by I. B. Beard and the two Newmans, actual possession of the property in dispute, Willow Point and Newman's Towhead, until 1907, when the Newmans disposed of the property. R. 53-67-70-77-79-90.

Mr. Learned, under Louisiana title, was in the actual occupancy and possession thereof, after the cutoff in 1912, for six or eight years, through his tenant, Lawrence Towns, and that possession *was exclusive*. R. 224-226-227-228-241.

The fact is while Scruggs was in possession of Tullos

Island, or Island 98, Mississippi territory in 1886, that island is shown to have washed away and to have entirely disappeared, and the channel of the river to have passed over its location, and the property in dispute is accretion from Louisiana, partly over the place formerly occupied by said island; that the land assessed, or sold in Mississippi, prior to the Spring of 1893 or 1894, the time when the island washed away, can have no bearing on the question now being discussed; that is the acquiescence by Louisiana in the dominion and possession of Mississippi of the territory in dispute, for the reason that as long as any of said island was left, it was Mississippi territory and no claim was made to it by Louisiana. After the island disappeared in 1893 or 1894, the Louisiana accretions had made over part of the former location of the island, attempted assessements made in Mississippi, after said date, of the land by sections, townships and ranges, of the former island, which did not then exist, *was not an assessment of the accretions,* which had made out from Louisiana, as same had never been surveyed, and had no section number or township. It was simply a perfunctory continuance of assessment by the State of Mississippi of land which before the same caved into the river had been a part of Mississippi, but which no longer had any existence. It was an assessment of land that had no existence and therefore means nothing.

By reference to Complainant's Exhibit "A," Willow Point was in Township 19 North, Range 14 East, Louisiana; unless the accretions extended easterly from the eastern side of said range line more than six miles, it would be in the same township and range as Willow

Point. If it extended East, more than six miles, such part would be in Range 15, *Louisiana*. Again, if any part of the accretions extended North beyond said township line, such part would be in township 20, *Louisiana;* provided a survey was made of said accretions, while all the land defendants claimed to have assessed, purported to be in township 9 North, range 8 West, of Mississippi.

Complainant's contention is that none of this Louisiana property was ever assessed, or sold at all by the purported assessments, and sales in Mississippi, and that even if Louisiana had notice of such purported Mississippi assessements and sales, which it did not have, it would not bind Louisiana.

The only notice to Louisiana, or its citizens, affecting real estate, is notice by record in the Parish where the land is situated.

Actual knowledge of any record affecting real estate, where that record is not in the Parish where the land is located, is not legal or binding notice.

> Louisiana Civil Code, 2264-2266.
> Gonsolin vs. Sparrow, 150 L., 107.
> And many cases.

If Mississippi, or its citizens had been in the actual possession of this Louisiana accretion, claiming and acting as owners, this might have started the current of prescription to run, and if such possession and claim had lasted sufficiently long, and had been set up by defendant in its pleadings, and established by proof, there might have been some reason for defendant to claim the acquisition of territory, by the dominion of defendant with the knowledge and acquiescence of Complainant: *but nothing of this kind existed.*

Defendant's contention, when laid bare by the facts, is simply this:

That Louisiana territory can be acquired by an assessment and sale in Mississippi, without the alleged purchaser taking possession, and without any knowledge of such assessment, or sale by Louisiana, or its citizens.

No court in Christendom will pay any attention to such contention.

There is neither allegation nor proof in the record, that either Louisiana, or the owners of the Louisiana territory in question, had any actual notice of the alleged assessments, or sales, and it is certain such notice would not be presumed.

It is a fact that accretions are not usually assessed in Louisiana, unless they are sold, when the assessor has some basis to act on; before then he would not know the description, acreage or value. Defendant claims the law requires an assessment. Suppose it does. The fact is well known to every resident on the Mississippi River, that such is not generally done.

These accretions are of various shapes and sizes, and have no value until timber grows upon them.

Until the last thirty five or forty years, the class of timber that grows on accretions had no value, and it is only in recent years that it has much value.

Whether these accretions were assessed by Louisiana, or not, as *Mississippi did not occupy or possess same*, would be no ground for Mississippi to claim the territory by virtue of its having exercised dominion and sovereignty over same.

If such were true, Mississippi could thus acquire any lands in Louisiana that she happened to find off the

assessment rolls in Louisiana, *simply by placing same on the assessment rolls in Mississippi, and then selling it for non-payment of taxes.*

Complainant, neither in its original nor first supplemental brief, devoted much space to this contention, as it did not regard same as an issue. The only reason it now discusses this question at length is because the Master, to whom this case was referred, seemed to think there might possibly be something to this contention.

Let us now examine and analyze the decisions of the Supreme Court, bearing on the acquisition by one State, or territory, of another, by the dominion and sovereignty of the one State over the territory of the other, with the knowledge and acquiescence of the latter State. It will appear *that none of them* have the slightest application to the facts of this case.

The Montgomery Plantation Map of East Carroll Parish, Louisiana, introduced by the Defendant, does not puport to be a map of surveys made at the time. On its face it shows that it was merely platted on original government surveys made many years before, and therefore does not show accretions or other changes in shore-lines or in the river which occurred subsequent to the original government surveys. It is manifestly a map intended only to show relative locations and coterminous boundaries of plantations in East Carroll Parish for general purposes. Its errors and omissions are manifest when compared with maps of actual serveys of the situs in quo made by the best of all authorities, the U. S. Government Engineers, acting under authority and direction of the Mississippi River Commission. * * * This map is

not admissible in evidence and its admission was objected to by Complainant. See Record, pages 300-301.

ANALYSIS OF JURISPRUDENCE ON DOMINION AND SOVEREIGNTY

As to boundary line between States, the general rule is, that long acquiescence by one State, in the actual *occupancy* of territory by another under a *claim of right,* and in the exclusive exercise of dominion and sovereignty over it, with full knowledge of the other State, is conclusive of the rightful authority.

In most of the cases of disputed boundary, the line had been fixed by agreements based on surveys, and rights acquired by actual occupancy up to said line, and held for many years to said line under title from the respective States. In such instances it has been held, the line would be conclusive of the rightful authority though not exactly correct.

We have examined carefully the following cases, showing the facts on which the decisions rested:

(1927) New Mexico vs. Texas, 72 L. Ed., 127, pamphlet 4.

(1926) Oklahoma vs. Texas, 71 L. Ed., 145-156.
(1926) Michigan vs. Wisconsin, 70 L. Ed., 595-601-603.
(1924) New Mexico vs. Colorado, 69 L. Ed., 499.
(1917) Arkansas vs. Tennessee, 62 L. Ed., 649.
(1909) West Virginia vs. Maryland, 54 L. E., 645-660.
(1905) Louisiana vs. Mississippi, 50 L. Ed., 913-934.
(1895) United States vs. Texas, 40 L. Ed., 867.
(1893) Virginia vs. Tennessee, 37 L. Ed., 537-544.
(1889) Indiana vs. Kentucky, 34 L. Ed., 336.
(1889) Deputron vs. Young, 33 L. Ed., 923-930.
(1887) Coffee vs. Groover, 31 L. Ed., 51.

(1846) Rhode Island vs. Massachusetts, 11 L. Ed., 1117.

(1838) Rhode Island vs. Massachusetts, 9 L. Ed., 1233-1264.

We now take up each of the above authorities and consider them seriatim:

(1927) New Mexico vs. Texas, 72 L. Ed., 127, No. 4. (Justice Sanford, Estopped or Prescription Held Good.)

Facts—New Mexico alleged the boundary was as it existed by virtue of a compact between the United States (while New Mexico was a territory) and the State of Texas, on the 9th of September 1850.

It further alleges where said location of 1850 was.

Texas admitted the boundary was as it existed September 9th, 1850, but that the location of such line was not as alleged by New Mexico.

Texas also set up where the location of the line was in 1850.

Congress passed a joint resolution in August 1911, that New Mexico should be admitted *subject to the "terms and conditions of"* the Joint Resolution of February 1911.

Said Joint Resolution of February 1911 declared that any provision of the Constitution of New Mexico that tended to annul or change the established boundary between the territory and the State of Texas as run by Clark in 1859 *and* 1860, shall be of no force and effect.

The Master had found, and the court held, that the boundary claimed by Texas as the boundary of 1850, was practically the same as the Clark line boundary.

Prior to the admission of New Mexico as a State, January 6th, 1912, Texas had issued patents to *practically*

all of the land in dispute and the patentees went into *physical possession thereof and so remained.*

The boundary line claimed by Texas, *had been tacitly recognized for more than half a century, and New Mexico expressly declared in its Constitution that the boundary ran "along the 32nd degree paralled to the Rio Grande, as it existed on the 9th of September*, 1850, *thence following the channel of the river as it then existed on the 9th day of September*, 1850.

The Master found all of the above facts, but held that as the river had after 1850 changed its channel by accretion, that the line changed.

Texas *filed an exception* to so much of *the Master's report* as declared the boundary had been changed by accretion.

The Court held the boundary line of 1850 as claimed by Texas was substantially correct; and that "this case is not one calling for the application of the general rule established (in various cases cited) as to changes in State boundary line caused by gradual accretions on a river boundary."

(December 1927) New Mexico vs. Texas, 72 L. Ed., 127, pamphlet No. 4.

In the above case the line was fixed by compact, and it was only a question of locating it.

The Court merely held in a case of that sort, that the doctrine of accretion had no application. In addition, Texas had been in actual occupancy of the disputed territory, with full knowledge and acquiescence of the United States, while New Mexico was a territory and with full knowledge and acquiescence of New Mexico after it became a State.

The facts of the above case can have no bearing on the case now before the Court, on the question at issue.

(Justice Sanford) (Estoppel or Prescription *Not* Sustained) 71 L. Ed., 156.

The general principle of public law, that as between States *long acquiescence in the possession* of territory under a *claim of right*, and in the exercise of *dominion and sovereignty* over it, is conclusive of the rightful authority. (However in this case, the estoppel, or prescription was not sustained.)

Oklahoma vs. Texas, 71 L. Ed., 156.

In Oklahoma vs. Texas, 71 L. Ed., 156, the Court held: "It is plain that, under the circumstances, essential elements necessary to the establishment of a *prescriptive* right by an exercise of jurisdiction acquiesced in for a long period of years, are lacking."

In the same case, 71 L. Ed., 156, the Court further held: "Nor is the fact, as to which the parties have stipulated, that since the decision in the Green County case, the United States and the territory of Oklahoma in succession have continuously enforced *their civil and criminal laws, over the territory in dispute*, sufficient to establish Oklahoma's claim to the territory by prescription."

Of course, the above case can have no application to the facts of the case now before the Court on the question at issue.

(1927) (Justice Sutherland) (Estoppel or Prescription *Sustained*) 70, L. Ed., 595-601.

"The rule, long settled and never doubted by this Court, is that *long acquiescence* by one State in the *possession* of territory by another, and in the exercise of

sovereignty and dominion over it, is conclusive of the latter's title, and rightful authority."

Michigan vs. Winconsin, 70 L. Ed., 595-601.

In Michigan vs. Wisconsin, 70 L. Ed., 595, the boundary was established in three sections: Montreal River Section—Menominee River Section—Green Bay Section.

In the above case, 70 L. Ed., 600, the facts were about as follows: *Boundary in Montreal River Section.*

"In 1874, taxes were assessed and *collected* by Wisconsin, and by 1886 practically the entire area had been subject to such taxation. *During this time, towns were built, highways constructed, public buildings erected, elections held,* Wisconsin law enforced, and other customary acts of dominion and jurisdiction exercised by that State within the disputed area."

From the foregoing facts and circumstances, the conclusions are inevitable that the description in the Michigan Enabling Act of the line from the mouth of the Montreal to Lake Desert was inserted under the mistaken belief that the river connected with the lake; that this mistake was discovered as early as 1841, *of which discovery Michigan long prior to the admission of Wisconsin, had knowledge;* that the line as now claimed by Wisconsin, was surveyed and marked by Cram and Burt, at the dates already stated; that *Michigan, not only assented to the result of these surveys, but actively participated in securing the insertion of the description of that line, in the Wisconsin Enabling Act,* and herself substantially adopted it by the Constitution of 1850, and that *for a period of more than sixty years she stood by without objection with full knowledge of the possession, acts of dominion, and claim and exercise of jurisdiction*

on the part of the State of Wisconsin over the area in question."

Under the above facts, the State of Michigan was held bound by her recognition of the boundary line.

The facts in the above case certainly can have no bearing on this suit.

In Michigan vs. Wisconsin, 70 L. Ed., 601—The Menominee River Section, the facts were about as follows:

In the Wisconsin Enabling Act, 1846, the evidence is pretty clear that a change in description was made in the boundary, "as part of a general readjustment of the boundary." * * * It contained a provision, "that to prevent disputes as to jurisdiction, the line shall be so run as to include within the jurisdiction of Michigan, all islands in the Brule and Menominee, down to and including the Quinnesee Falls of the Menominee; and thence so as to include within the jurisdiction of Wisconsin, all islands in the Menominee below the Falls."

Since this Enabling Act, (1846) Winconsin has *asserted* and *exercised dominion over the islands*, as set forth in the Wisconsin Enabling Act. The Court said:

"We therefore hold as to this section of the boundary, that from Lake Brule to the mouth of the Menominee, the line which is now fixed and finally established by long acquiescence, follows the channel of the Brule and Menominee wherever they are free from islands; that wherever islands are encountered above Quinnesee Falls, the line follows the channel nearest the Wisconsin mainland, so as to throw such islands into Michigan; and that wherever islands are encountered below the Quinnesee Falls the line follows the channel, nearest the Michigan mainland, so as to throw such islands into Wisconsin.

In the above case the Court held the evidence was pretty clear that the line claimed by Wisconsin was established by agreement; that Wisconsin claimed and exercised jurisdiction over the territory; and that Michigan had long acquiesced therein.

Such facts can have no bearing on the present case, where there is no similarity in the facts.

In Michigan vs. Wisconsin, 70 L. Ed., 603—The Green Bay Section—the facts were about as follows:

In the Michigan Enabling Act, the boundary was recited to be down the Menominee to "the center of the *most usual ship channel* of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay, to the middle of Lake Michigan.

There were two ship channels, either of which could apply.

"The title of Wisconsin to the disputed area is established by *long possession* and *acquiescence;* and this conclusion is justified by the evidence, and by concessions of the most substantial character. * * * Almost from the day of her admission, the State (Wisconsin) has continuously possessed, asserted title and exercised jurisdiction and dominion over all of the islands within the boundary claimed by her, Wisconsin's title held good."

In the above case, the occupancy of each State was to the channel claimed by Wisconsin as the boundary, with full knowledge and acquiescence of Michigan for many years. There are no such facts in the suit now pending, and the above case can therefore have no bearing on this suit.

(Justice Sanford) (Estoppel or Prescription *Sustained*) (69 L. Ed., 499) Except as otherwise shown for more

than thirty years, the Darling line, intended to be run along the 37 parallel of North Latitude, remained *undisputed*, and the correctness of its technical execution unquestioned; it had been recognized by the United States, and by the State of Colorado, by the territory of New Mexico, and by the State of New Mexico, except as otherwise indicated by the bringing of this suit, and has now been recognized by the Land Department as the boundary between Colorado and New Mexico; that from 1868 *to the present time* (1924) the territory, and later the State of Colorado, *has claimed* and exercised dominion and sovereignty over the territory down to the Darling line, and no farther; *that county lines have been formed, and settlements grown up, school districts, election districts, land districts and water districts have been* created with reference to said line; *public officers* have been elected, property assessed and taxes levied *and collected* under authority of the State of Colorado; and *its Courts of both civil and criminal jurisdiction* have exercised jurisdiction in all places *north of said Darling line;* and the territory and the State of New Mexico have exercised like jurisdiction in all places south of said line; *Government Post Offices have been established* as being in Colorado when North of said line, and as *in New Mexico when South of said line;* and *the public surveys on both sides of said line have closed theron;* lands have been disposed of, rights acquired, and political boundaries in both Colorado and New Mexico have been fixed by reference to said line. In addition, New Mexico adopted the Darling line in 1912, and recognized same until the filing of this suit; Held, that said line was the boundary re-

gardless of whether it was accurately run along the true Meridian line.

New Mexico vs. Colorado, 69 L. Ed., 499.

The facts of the above case are so extremely different from those of this case, we do not think defendant would contend they had any application.

Arkansas vs. Tennessee, 62 L. Ed., 638-1213. (Justice Pitney).

The decisions of Tennessee fixing the boundary line between the State and private individuals, *can have no effect against the State of Arkansas* which was a stranger to the record.

Arkansas vs. Tennessee, 62 L. Ed. 649.

The judicial department of Tennessee held the territory in dispute to be property of Tennessee. Arkansas did not acquiesce therein, it was no party thereto and was not bound thereby.

The Executive Department of Mississippi made tax sales, and issued patents, not of the land in dispute, but of alleged land in certain sections, townships and ranges, when same did not exist, but had washed away and parts of the place where such land once existed had been covered by accretions from Louisiana. No one from Mississippi ever took possession. The lands were accretions mostly covered by timber. No notice of said proceedings by the Executive Department of Mississippi was ever given to Louisiana, or alleged, or shown, and there was no acquiescence by Louisiana, and there could have been no acquiescence by Louisiana without knowledge of the existence of the facts. Such acts could no more bind Louisiana, than a decision of the Mississippi Court holding said lands to belong to Mississippi, could bind Louis-

iana, when Louisiana was no party to such decision. All of the assessments and deeds evidencing such acts are "res inter alios acta."

(1909) (Maryland vs. West Virginia) (Justice Day) 54 L. Ed., 645.)

West Virginia filed an answer and cross bill, in which she says the true boundary line, long recognized and established, is the one known as the "*Deakins*" line, and prays said line be established as the true line, between the said States (p. 649). This line was probably run in 1788 (p. 653.)

Maryland recognized this line in 1823, in making land grants. (p. 657.) Virginia for many years conveyed land with reference to *this line as the boundary line.* (p. 658.)

The people for many years have accepted and adopted this line (p. 658.)

West Virginia vs. Maryland, 54 L. Ed., 645-660.

In the above case, West Virginia claimed the Deakins line to be the true boundary line, and Maryland in sundry grants recognized it as the West Virginia and Maryland line, as far back as 1823. Roads were worked as a rule on the West Virginia side up to the Deakins line: Maryland worked the road on the other side of this line. On the West Virginia side, taxes were paid in West Virginia, and the people there voted in Virginia. As a rule, the schools established there were West Virginia schools. And the allegiance of nearly all of the people were given to West Virginia (p. 657.)

Under these facts the Court held the Deakins line to be the boundary, and a commission was appointed to locate and establish it.

West Virginia vs. Maryland, 54 L. E. Ed., 645-650.

The mere reciting of the facts of the above case shows that it can have no application in the present suit, where there is no similarity of facts.

(1905) Louisiana vs. Mississippi, 50 L. Ed., 913, C. J. Fuller).

In 1886 Louisiana passed an Act vesting control of oyster industry in the Parishes where situated. (p. 924.)

By Acts of 1896, non-resident fishermen were phobibited from fishing in Louisiana waters, and the dredging of oysters was also prohibited.

In January 1898, St. Bernard Parish equipped and sent out an expedition to exclude non-resident oyster fishermen.

Non-resident Mississippi oyster fishermen were found there and were notified that they must stop fishing, and move out of those waters. The Mississippians complained to Mississippi authorities and a conference followed between authorities of St. Bernard Parish and Hancock County.

In 1901 a meeting of State officials was held in New Orleans, resulting in the appointment by the Governors of each State of a commission to try to settle the boundary dispute Louisiana presented a conference map showing Louisiana's contention, and Mississippi reported it was impossible to make an amicable extra judicial sttlement.

In 1902 Mississippi placed control of the oyster industry of Mississippi in the hands of a commission, and were authorized to maintain patrol boats to maintain the oyster laws. (p. 924.)

In July 1902 Louisiana also created an oyster commis-

sion, authorized to maintain an armed patrol on Louisiana oyster waters, and to protect her rights.

The oyster commissions of the two States established a neutral territory pending a decision of the Supreme Court.

By Act of Congress, of April 8th, 1812, additional territory was added to Louisiana. (pp. 925-926.)

The Act admitting Mississippi, was passed five years after the admission of Louisiana. (p. 927.)

By Act of Congress of May 12th, 1812, the boundaries of Mississippi territory were defined, by which she claimed the territory in dispute.

Louisiana contended that the territory in dispute was previously given to her by Act of April 8th, 1812.

"The contention of Mississippi is based on an assumed inconsistency between the Louisiana and the Mississippi Acts, but we think, upon a true interpretation, in the light of facts, no such inconsistency can be imputed." (p. 929.)

The Court further said:

"The record contains much evidence of the exercise of Louisiana jurisdiction over the territory in dispute, and the general recognition of it by Mississippi as belonging to Louisiana.

Apparently Louisiana had exercised complete dominion over it from 1802, with the *acquiescence* of Mississippi, unless the fact that the latter made a general reference to islands within six leagues of her shore in her Code of 1880 indicated otherwise.

But the evidence fails to satisfy us that she attempted

any physical possession or control after 1900. The disputed territory held to belong to Louisiana.

Louisiana vs. Mississippi, 50 L. Ed., 934.

It will be seen that the above case did not rest upon the exercise of *Jurisdiction* or *dominion* to *acquire territory*, but that the Acts of Congress gave the territory to Louisiana, and that Louisiana merely exercised dominion over the territory it owned.

The above case, therefore has no application to the pending litigation.

(1895) United States vs. State of Texas, 40 L. Ed., 867. (Justice Harlan.) (*Estoppel Not Sustained.*)

The designation for a short time of a postoffice, as in Green County, Texas, on petition of persons describing themselves as residents of such County, before the authorities of the Portoffice Department discovered that it was located in the territory which was in dispute between the United States and Texas, does not strengthen the claim of Texas to such territory.

United States vs. State of Texas, 40 L. Ed., 867.

Of course the above case can have no bearing on this litigation.

(1893) Virginia vs. Tennessee, 37 L. Ed., 537-544.—(Justice Fields.)

Independently of the effect due to the compact as such, a boundary line between States, or Provinces, as between private persons, which has been *run out, located*, and *marked upon the earth*, and *afterwards recognized and acquiesced in by the parties for a* long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, *not as an*

alienation of territory, but as a definition of the true and ancient boundary.

Virginia vs. Tennessee, 37 L. Ed., 544.

In above case, the bounary had been run out and marked, and recognized for many years by each State. The line set up by Tennessee was one run by Commissioners appointed by Virginia and Tennessee after they became States; by Virginia in 1800 and Tennessee in 1801, approved by legislation of both States in 1803; (p. 538.) This line was assented to by Congress. (p. 544.) Tennessee had merely exercised its jurisdiction and dominion up to the true line.

This is not a case where territory was acquired by prescription or estoppel.

(1889) Indiana vs. Kentucky, 34 L. Ed., 329.) (Justice Field.) Held: Long Acquiescence is *Conclusive of Title*.

The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties, which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her *possession* of the island and jurisdiction over it.

Indiana vs. Kentucky, 34 L. Ed., 336.

In the above case, Kentucky had had actual and exclusive occupancy of the island, under a claim of right for nearly one hundred years, and the facts show it was actually within the boundary of Kentucky, applying the rules applicable to avulsions to islands, where the channel changed from one side to another.

In addition, Indiana had constantly recognized such boundary by its acquiescence in the occupancy, jurisdiction and dominion of Kentucky.

The facts of the above case have no application to the pending case.

(1889) Deputron vs. Young, 33 L. Ed., 923. (C. J. Fuller.)

Where the rightful owner is in the actual *occupancy* of a part of his tract, he is in the constructive and legal possession and seizin of the whole, unless he is disseized by *actual occupation* and *dispossession;* and where the possession is mixed, the legal seizin is according to the legal title.

Deputron vs. Young, 33 L. Ed., 930.

This case merely applied the rules relative to possession of a part of a territory, which is that if the rightful owner is in possession of a part of a continuous body of land acquired under one title, and no other claimant is in the actual occupancy of any other part thereof, his actual occupancy of a part, extends to him constructive possession of the whole. But if any one else is in the actual occupancy of any part of such tract claiming as owner, constructive possession of the other claimant, can not cover such part. That actual occupancy ousts constructive possession. That where two are in possession of parts of the same continuous tract, claiming as owners, there can be no constructive possession, but the possession is held to be in him who has the superior title, or as this is sometimes expressed constructive possession follows the superior title.

(1887) Coffee vs. Groover, 31 L. Ed., 51. (Justice Bradey.)

Grants of land made by a Government, in territory over which it exercises political jurisdiction de facto, but which does not rightfully belong to it, are invalid against the Government to which the territory rightfully belongs.

(Syllabus) Coffee vs. Groover, 31 L. Ed., 51.

The United States had made grants to Coffee of land in Florida; Coffee's title was not only on the grants but on a delimitation of title under a Treaty between the United States and Spain.

Georgia claimed that the line was different from that claimed by the United States and Florida, and North thereof.

Georgia granted the same land to Groover, which was North of the Watson line, which is claimed was the correct line. Georgians worked the road to the Watson line, and Floridians on the other side; as far back as the witness could recollect, Georgia exercised jurisdiction to the Watson line. People North of Watson line did jury duty and voted in Georgia; the wills of people dying there were probated in Georgia and their estates administered in its Courts; Georgia exercised jurisdiction to the Watson line, and people were tried for offenses in the Georgia Courts. Florida did not exercise any powers of Government North of the Watson line. (31 L. Ed., 54.) The State line was the Orr and Whitner line, North of the Watson line.

Groover's contention was first, that grants by a Government de facto, of parts of a disputed territory in its possession, are valid against the State which had the right. The Court held otherwise.

Referring to the case of De Lacroix vs. Chamberlain, 6 L. Ed., 742.

The Court said: "The first (proposition) is opposed to the cases which we have already cited in relation to Spanish Grants in Mississippi and West Florida, and to the case of Poole vs. Fleeger (9 L. Ed., 680). The land in controversy was between the Watson line and Orr and Whitner line.

Coffee the owner under the Florida title, and title from the United States, held to own the land."

(1846) Rhode Island vs. Massachusetts, 11 L. Ed., 1116. (Justice McLean.)

The lines were established by agreement. Even if mistake were proved it would not be disturbed after a possession of two centuries by Massachusetts, under an assertion of right, with the claim admitted by Rhode Island, and other Colonies in the most solemn form.

Rhode Island vs. Massachusetts, 11 L. Ed., 1117.

The above case is so clearly inapplicable to the facts in the present suit, as to need no further comment.

"No court acts differently in deciding on boundary between States, than on lines between separate tracts of land."

Rhode Island vs. Massachusetts, 9 L. Ed., 1264.

Subject to certain exceptions pointed out in the briefs of Complainant, the above rule is correct, but has no bearing on the question of prescription or estoppel.

AGREEMENT OF COUNSEL, JANUARY 1929

In the above numbered and styled cause, the counsel of Complainant and the counsel for defendant have made and signed the following agreement, to-wit:

1st, That in R. 175, it is admitted that witness, Capt. H. M. Marshall said:

"There was a swift current flowing down between the two islands, and a channel to the East of both islands. Without being able to say how wide it was, it was possibly 1000 feet wide, etc., instead of 100 feet wide, as transcribed in the record."

2nd, That the questions and answers of Capt. Chas H. West, as shown on pages 28, 29 and 30 of Complainant's First Supplemental Brief, be received in evedence herein, with the same effect as if he had been testifying as a witness.

That the following blue prints be admitted as evidence when certified to by Walter H. Hoffman, Secretary of the State Board of Engineers of the State of Louisiana, as correct copies of the original on file in the office of the State Board of Engineers, to-wit:

1st, Map showing changes in river bank and levee lines along the front of *Illavara and Villa Vista Plantations*, in the Parishes of East Carroll and Madison, Louisiana, from 1824 to 1889. * * * *** Prepared in office of the State Board of Engineers, New Orleans, La., Jan. 3rd, 1900. Scale 1:20,000.

2nd, *Map of the Alsatia, Salem, Villa Vista, Mascot Bend*, in the Parishes of East Carroll and Madison, Louisiana, showing levees built from 1866 to 1906, and bank lines of 1866 and 1899, prepared by request of Capt. G. M. Hoffman, U. S. A., from

the records of the office, by the State Board of Engineers, January, 1906. Scale 1:20000.

3rd, Blue print from original tracing, showing Louisiana bank line of 1866, at Willow Point and vicinity.

This agreement is signed in triplicate, in January, 1929.

The State of Louisiana.
By John Dale.

The State of Mississippi.
By Rufus Creekmore.

Discussion of Blue Prints Relating to Defendant's First Contention

On the blue print under discussion, it will be seen that the surveys of Louisiana bank lines of 1824, 1866, 1880, 1882, 1885, 1889, 1890, 1891, 1894, 1898, 1899, West and Southwest of Willow Point, but that these lines were not all extended North or East of Willow Point, but those of 1866 and 1882 were so extended.

Under agreement of counsel, January 1929, there is also filed in evidence, blue print of,

2nd, "Map of Alsatia, Salem, Villa Vista, Mascot Bend, in the Parishes of East Carroll and Madison, Louisiana, showing levees built from 1866 to 1906, and bank lines of 1866, 1899, prepared by request of Capt. G. M. Hoffman, U. S. A., from the records of the office of the State Board of Engineers, January, 1906. Scale 1 to 20000."

This blue print shows a gradual recession of the levee lines North and West of Willow Point from 1866 to 1900;

it shows the levee lines of 1866, 1868, 1871, 1880, 1881, 1882, 1884, 1887, 1888, 1889, 1890, 1899 and 1900.

It also shows the Louisiana bank line of 1866, both North and East of Willow Point, and also the bank lines of 1899 and 1913, the 1913 bank line also showing the cut-off of 1912-1913.

It shows that at the Northeast of Willow Point, the bank line of 1899 crosses the bank line of 1866, and which shows that at that point between 1866 and 1899, there could have been no avulsion of the river through Mississippi territory. It also shows that from said point South, the Louisiana bank line of 1899 gradually extended further East from the bank line of 1866. This shows that at the point where this extension began, it was jam up against the bank line of 1866, which necessarily makes the extension accretion.

Discussion of Blue Prints
Further Answering Defendant's First Contention

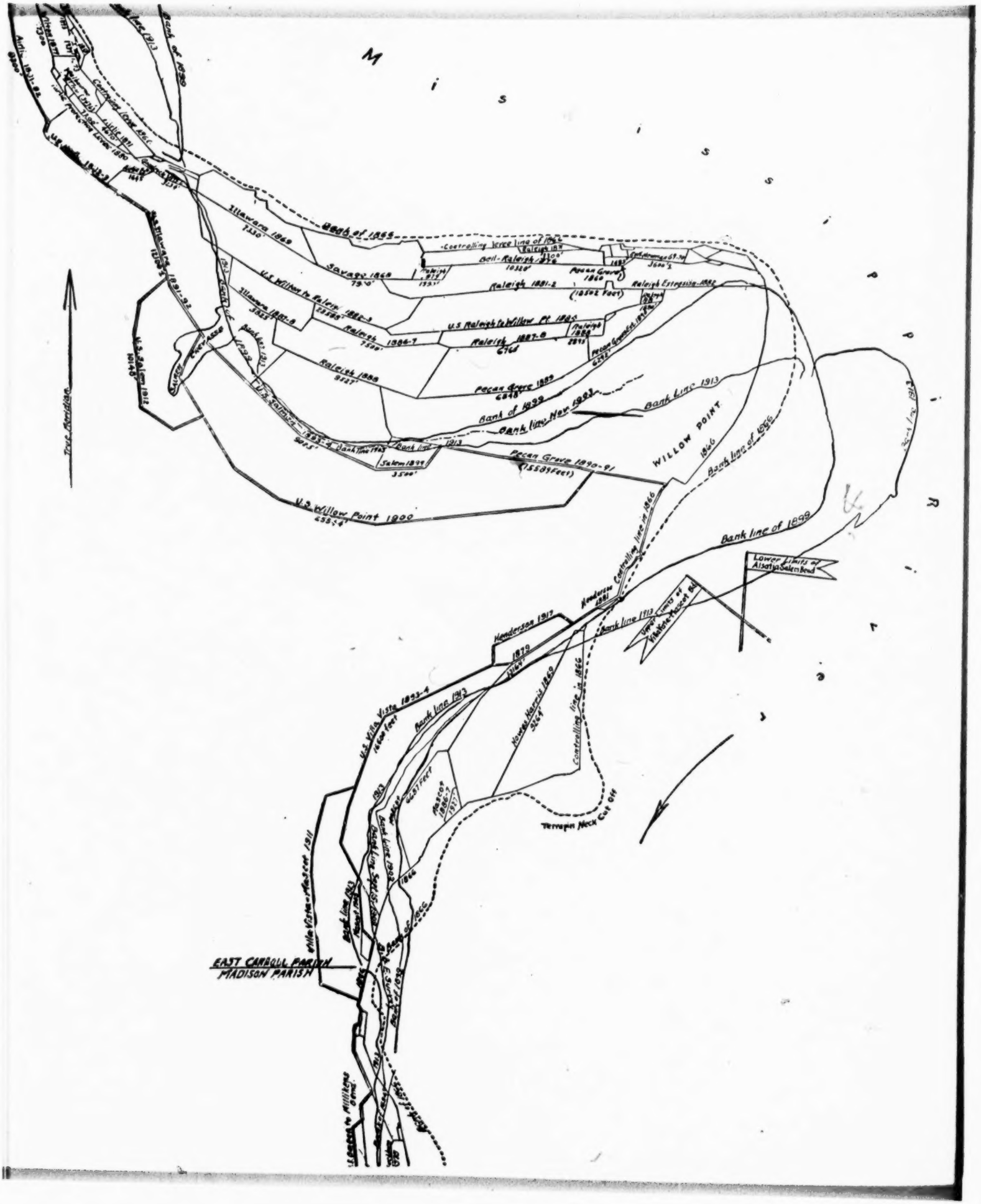
In January, 1929, Counsel for the State of Louisiana and for the State of Mississippi agreed in writing that three blue prints should be filed in evidence. On one of the blue prints covered by this agreement of counsel, appears the following:

1st, "Map showing changes in river bank and levee lines along the front of *Illawara and Villa Vista Plantations*, in the Parishes of East Carroll and Madison, Louisiana, from 1824 to 1899, compiled from charts of the Mississippi River Commission 1882 surveys, surveys of United States and State Engineers, and from United States General Land Office maps, prepared in office of

Map of Illawara and Villa Vista Plantations

M i s s i s s i p p i R i v e r
WILLOW POINT
Bank line of 1899
Bank line of 1866
Bank line 1913
Controlling line in 1866
Lower Limits of Alsatia-Salem Bend
Upper Limits of Villa Vista-Mascot Bd
Pecan Grove 1890-91 (15589 Feet)
U.S. Willow Point 1900 23544
U.S. Salem 1912 10148'
Illawara 1891-92 12100'
Illawara 1869 7330'
Savage 1868
Airlie 1881-82 8200'
Wilton 1877
Henderson 1912
Howes Harris 1869 3264'
Bank Line 1902
Bank Line Sept 15, 1908
Villa Vista-Mascot 1911
Terrapin Neck Cut off
EAST CARROLL PARISH
MADISON PARISH
True Meridian

Map of Alsatia, Salem, Villa Vista, and Mascot Bend


Bank of 1929
Bank line 1913
Tillaware 1869
7330'
Savage 1868
7900'
Controlling levee line of 1882
Raleigh 1887
10320'
Cell-Raleigh 1900
Pecan Grove 1869
(18502 Feet)
Raleigh 1881-2
Raleigh Extension 1882
U.S. Willow Pt to Raleigh 1882-3
23350'
Tillaware 1881-8
3825'
Raleigh 1886-7
7500'
U.S. Raleigh to Willow Pt 1885
Raleigh 1887-8
Cell
Raleigh 1888
6298'
Pecan Grove 1889
6848'
Raleigh 1888
9287'
Bank of 1892
Bank line New 1923
Bank line 1913
WILLOW POINT
1866
Bank line of 1926
Pecan Grove 1890-91
(15589Feet)
U.S. Willow Point 1900
6585'4"
Bank line of 1849
Lower Limits of Alkatip Salem Bend
Henderson 1881
Controlling line in 1866
Henderson 1917
1879
Bank line 1913
Upper Limits of Alkatip Neck Cut
U.S. Villa Vista 1893-4
14600 feet
Bank line 1913
Howes Harris 1869
5164'
Controlling line in 1866
Terrapin Neck Cut off
Bank line 1913
Bank line 1913
Bank line 1913
Bank line 1913
Villa Vista-Rockport 1911
Bank line 1913
Bank line 1913
Bank line 1913
Bank line of 1866
EAST CARROLL PARISH
MADISON PARISH
Bank line 1913
Bank line 1913
Bank line 1913
Bank line 1913

State Board of Engineers, New Orleans, La., January 3rd, 1900, scale 1 to 20000."

All bank lines referred to on this blue print are Louisiana bank lines.

By an examination of blue print, it will be seen that the first *dash* line in front and East of "*Willow Point Plantation*" is the "bank line of 1824." It will further be seen that the *dotted* line in front and East of said Plantation is the bank line of 1866, and that the first solid line in front and East of said plantation bank is the bank line of 1882, and the next line in front of the 1882 bank line is the "sand bar, 1882."

Taking the various lines where the 32 degree, 36 minute North latitude, crosses through Pecan Grove Plantation, just South of Willow Point, it will be seen that the distance between the 1824 bank line and the 1866 bank line is seven-eights of an inch, or 513 yards, as will be seen from the table on page 10 of the first supplement brief of Complainant. At the same place the difference between the bank line of 1866 and 1882, is nine-sixteenths of an inch, or 420 yards, which is less than one-third the average width of the river, and therefore could not have included the channel of an avulsion through Mississippi. At the same place the sand bar line of 1882, had extended East beyond the bank line of 1882, more than three and one-quarter inches, being more than a mile East beyond the bank line of 1882.

This map also shows near the northeast part of Willow Point Plantation, the bank line of 1824, and the bank line of 1866 was exactly at the same point; that is where these lines cross, and from which point southward the

1866 bank line, gradually extended further east than the 1824 bank line.

This map also shows that a little South of the point where the 1824 and 1866 lines cross, the 1882 bank line crosses the 1824 bank line, and a little North of said point where the 1824 and 1866 lines cross, the "*sand bar line*" of 1882 crosses the bank line of 1824. All of which is at the North east part of Willow Point Plantation.

This map demonstrates that the 1866 bank line extended out from the 1824 bank line; that at one point the two lines were exactly at the same point, and that same gradually extended out. This destroys the theory of defendant, that at some period between 1824 and 1866 there might have been an avulsion at this point; and as the additions to the Louisiana bank line eastwardly, began at the bank line of 1824, and jammed up against the bank line of 1824, this conclusively shows the additions to be accretions.

There was no place for an avulsion; and if the bank at the northeast part of Willow Point was the same in 1882 as it was in 1824, and from said point southward the bank line of 1882 had gradually extended out beyond the 1824 line, it necessarily connected at said point, and the additions were necessarily accretions.

By an examination of the map attached to page 12 of defendant's brief, running from the survey of 1824 to the outer edge of the sand bar in 1882, each contour line represents a difference in elevation of five feet. Next to the timber on the Louisiana side the elevations is 105 feet, and this decreases, each contour line being 5 feet less, until the water's edge was reached, where the elevation was 75 feet. With the exception of a little de-

pression next to part of the main bank of 1882 the decline was in almost regular progression from 105 to 75 feet.

The depression mentioned did not extend all the way North to the river, and in its deepest part the elevation was 95 feet.

This gradual decline of the sand bar from the top of the bank to the water demonstrates that the additions were accretions.

Did River Run Around Tullos Island and Adjacent Island?

Further Answering Defendant's Second Contention. Eye Witness of Defendant.

Defendant only had three eye witnesses who saw Island 98, or Tullos Island, prior to 1894, and who say that it did not entirely cave away. Of these three witnesses, one is white and two are negroes, to-wit: R. E. Foster, white, Lawrence Towns and William Miller, colored. We will examine their testimony in the order named.

First: *R. E. Foster's testimony.*

He knew Island 98, or Tullos Island. Sometimes called Scruggs Island. He lived right across the river, three miles over the land. He had three places. The Island is in sight of the *lower place*. He had two places, called Arcadia and Forest Home; Forest Home is the lower of the two places. He did not live on his lower place; sometimes went there twice a day and sometimes once a week. Has *seen* Island 98 more than once a month. R. 208-209.

But he did not say he went near Island 98 once a month.

Mr. Purnell said, in answer to inquiry to how far Mr. Foster lived, "Is ten or twelve miles." R. 265.

Mr. Foster said if all the island (98) washed away, he did not see it. "It never all washed away." R. 209.

He said between 1882 and 1912, the river cut away the bank between his place and the island, but in this caving the Island did not wash away. But he did not say the channel passed between Island 98 and his place. He was not able to say how much of it was left. The river used to go up further west, over the upper part *around next to Louisiana.*

At one time there was some land on the island in cultivation and a gin on it. A man occupied it by the name of Scruggs. It was known as Scruggs Island. It was called two or three names. He did not know what the other was. In the nineties there was timber there when he *looked across* and saw the island from the best he could tell with the eye. It looked like it (the timber) might be forty or fifty feet high. R. 210.

This, therefore, could not have been old timber such as shown to have been on the island.

In 1882 he *thought* the river ran between the island and the Louisiana shore.

Asked if he knew of the cut off of 1912, he said the river changed there time and again. * * * That it is very wide; *sometimes a sand bar would show up in the center;* Sometimes on the Mississippi side; and sometimes on the Louisiana side.

Q. The river shifted there from time to time?

A. Yes sir, very often. R. 211.

But he did not say it ran between Island 98, or the bar in front of his place and the Mississippi shore.

He said when he went there, the river was between the island and the Louisiana shore, and was asked when it changed and came back between the island and the Mississippi (shore), replied: "*It has been doing that off and on.*" R. 212.

In other words, according to the witness, the river was first on one side of the island and then on the other, as he expressed it, "off and on." This, if believed, would contradict the entire record.

"When he went there in 1882, the channel of navigation was on the Louisiana side."

Comment: (In front of his house it may have been, but not in front of Island 98) it is on the Mississippi side now." That is true, but it is not behind Island 98, or any other Mississippi Island. It changed gradually. He said, "*My front caved off and as it caved off* it came on over to my side and is there now." That is true, but it swept every island out of the river, at the point in controversy on its way over.

Asked if he knew when the boats stopped running west of the island and began running east of it, said "I don't know *all of it*. It gradually occurred, every year, as far as that is concerned."

He knew his place was cutting away fast, but asked if he paid much attention to where the boats ran, answered, "*I did not.*" R. 213.

He did not know when they stopped running on the Louisiana side of the island, and began running on the Mississippi side. The little boats ran there first and after a while the big boats began to go through there.

Here he was evidently referring to the cut-off of 1912-1913.

Asked if he could give any idea when the big boats began running *next to the Mississippi* shore, said he could not because *in front of his place there was a big island there.* He evidently referred to the sand bar above island 98, which formed there evidently between 1870 and 1882. He recollected the *cut off* it made gradually year by year. The small boats ran through first and then the big ones. He could not recollect the size of the island when he first knew it. *It did not extend above his place. It was just across the river from his lower place.* R. 214.

This island was in front of both of his places. (This likely referred to high sand bar above Island 98. He did not know anything about the size of Island 98, in 1882. He did not know how long it was. He did not know how wide it was. He did not know anything about it. R. 215.

The island is *west* of his place. The channel has not filled between my place and the island. *The Mississippi River is there now.* He supposed the channel filled between the island and the Louisiana side. (He evidently is referring to Newman's Towhead.)

He knows the island caved. *The island is gone—the part next to me is gone*, and the river channel is there. R. 216.

This no doubt referred to the island, or high sand bar above Island 98, as Island 98 was a number of miles below his nearest place.

It (the channel) must be two or three miles wide between his place and the island. He can look *across* and

see the timber is the reason why he can tell there is an island.

The whole channel of the river is between the island and my place. (1926. He evidently refers here to Newman's Towhead.)

Asked if the only reason he had for knowing any island was left, was the fact that he could see timber a distance of two miles, replied, R. 217,

"Yes sir, and hunters being on the island. I have not been there myself." He would look *exactly west* from his place to see the timber, a distance of two miles, but he could not tell whether the timber he saw was on the Island, or main Louisiana shore. R. 218.

He said it would not have been possible for the island to have washed away and he not know it, as he had been there; but that was back in 1882. He bought the property in 1882, and had been there (at his place) from that time 'till this. R. 211. (But the testimony only shows he went near the Island one time.)

Comment:

We think Mr. Foster wanted to tell the facts as he understood them, but the trouble with his testimony is that in later years he knew but little about Island 98, or Tullos Island.

He seems very much confused in his statement regarding Island 98, the sand bar above, and Newman's Towhead.

He had three places. The island was in sight of his lower place. He did not live on this place. From the place he lived on he could not see the island.

There is no doubt that Mr. Foster had seen Island 98, or Tullos Island in 1882, or shortly after. The testimony

shows a man lived there by the name of Scruggs, who cultivated land on the island, and had a gin there. Mr. Foster was there on a steamboat, which put off freight there, and in 1882 the river ran between the island and the Louisiana shore.

These were unquestionably facts.

This was before the island caved away, and while Scruggs was there with his gin. There is no evidence to show that he ever made another trip down by the island; but he thought he could see the island, from his lower place, a distance of some two or three miles. He could look across and see the timber in the nineties, 40 or 50 feet high, and that is why he could tell there was an island.

That Island 98 was exactly west from his place.

By an examination of the chart in defendant's brief, at page 14, it will be seen that Mr. R. E. Foster's place was adjacent to Dunbarton Landing; but the Home Place, which had mostly caved in the river, was evidently further south toward Duvall's Landing. Island 98, or Tullos Island, or Scruggs' Island, was southeast of Mr. Foster's property, and not west.

The part of the sand bar which extended west of his place in 1882, as shown by the 1882 survey, had no trees upon it, and besides, this bar was less than a half mile from his place; it therefore, could not have been the upper end of this sand bar referred to by defendant as upper Tullos Island, that Mr. Foster referred to, for the reason Mr. Foster said the island was two or three miles distant, west and across the river from his place. He repeated twice, that Island 98 was west of his place; once he said it was *immediately* west; this we have

shown was impossible. When he said this, he was not talking about Tullos Island, or Island 98, or Scruggs' Island. He was evidently talking of Newman's Towhead which was Louisiana territory, as it was west. As Hopkins Island had disappeared, or if it had not all disappeared in 1882, the little that was left was incorparated with Willow Point, he could not have referred to Hopkins Island, except as possibly a part of Willow Point. He said the channel of the river must be two or three miles wide. The whole channel of the river was between the island and his place. He could only tell that it was the part of the island that was left (Island 98), by looking across and seeing the timber, but he could not tell whether the timber he saw was on the island, or on the main Louisiana shore. The fact is he knew very little about it.

As the evidence conclusively shows that up to 1890, the channel of the river was west of *Tullos Island*, and the *long sand bar above*, shown on the charts of 1882, and that the chute between them and the Mississippi was only 1,000 feet wide. (R. 173-175.)

This was only during high water, as in low water a skiff could not get through there. R. 309.

The channel never did go there during that time (which covered the period mentioned by Capt. Marshall to 1890); at that time "during low water you could walk across from the Mississippi shore to the island. R. 314-315.

Mr. Foster's reference could not be to either of them; especially as he said in the nineties he looked across (the river two or three miles distant) and saw the is-

land, (and) from the best he could tell with the eye, the timber might be 40 or 50 feet high; R. 210,

but later admitted, on cross examination, that he could not tell whether the timber he saw was on the island or on the main shore of Louisiana, (R. 218), nor the height of the timber. (R. 218.)

From his testimony the channel changed back and forth a number of times, at this place. He said it changed there time and again. At another time he said, "the island is gone, that is the part next to me is gone, and the river channel is there."

It is evident from his whole testimony that it had been many years since he had been near Island 98, and that the island he referred to as "gone" was the high sand bar above Island 98.

Is such indefinite and uncertain testimony that all of Island 98 never disappeared, to outweigh the positive statement of witnesses who knew that it all caved away? One of the witnesses lived on the Mississippi shore immediately across the chute from the Island and the other passed it six times per week.

Mr. Purnell who lived on the Mississippi bank opposite Island 98, from 1880 to 1897, and who had *been on it hundreds of times*, said it all washed away in the freshet of 1894 or 1895, and later said 1893, 1894 or 1895. R. 264-265-271.

Jas. V. DeLahunt, (R. 269-291) who was pilot and captain on the Mississippi River from 1879 or 1880 to 1908, passing the point in controversy six days in a week, and whose special business it was to watch all changes in the river, such as islands, sand bars, accretions and cavings, so as to enable him to run with safety,

said, when asked what became of this Island, "*It disappeared absolutely.*" When asked what became of the trees on the island, said: "They went to China, I reckon." R. 292.

He said, "It entirely disappeared—nothing left of it. He was running up and down there six times a week, (R. 294), and ran steamboats over the top of the place where it had been."

Second: *Lawrence Towns' Testimony.*

He was defendant's witness. He is colored. R. 224. Cannot read. R. 220. Said he went to the location in controversy in 1880. He knew where Island 98 was, "they called it Scruggs' Island, and there was another, we called "*Tom Hopkins Island.*" Scruggs' Island was in front of Chotard. R. 220.

Asked to state whether the island had been there ever since he had been there, R. 221.

Answered, "Yes sir: *a part of it.*" R. 222.

He was a roustabout on steamboats, running by the place in controversy, for ten years. R. 220.

When asked if the Newman place was called Willow Point, said, "Some called it Willow Point, and have got it here in my pocket." He then handed counsel a lease, from Messrs. R. F. Learned & Son, to the witness, of the property in controversy. (He leased it for six or eight years after 1912.) R. 224-225-227.

This property was called Newman's Towhead, in the lease. This property leased to Towns is the property in controversy. He had 800 or 900 hogs on the land he leased, known as Newman's Towhead. R. 227.

That he had his hogs on Hopkins Island. This shows, what he called Hopkins Island was the same property

that he leased from Mr. Learned, as Newman's Towhead, being the property in controversy. R. 232.

He said later that Hopkins Island was north, or up stream from Scruggs Island, just a little ahead of it. R. 232.

This makes his testimony very contradictory, and even if such arose from ignorance and stupidity, it is insufficient to contradict the positive clear cut testimony of Mr. Purnell and Captain DeLahunt, that all of Island 98, or Tullos Island disappeared.

He said that in low water you could walk all the way from the Louisiana shore to Newman's Towhead. R. 233.

While on page R. 234 he said he could not say.

Witness said he figured that the land *came back* from Scruggs' Island. R. 238.

Asked if he figured that it came back from Scruggs' Island, the island where he put his hogs, answered: "That is what I figured when I went over there to live." He was then asked if Scruggs' Island disappeared, and answered: "Not all of it. A portion of it did. *At low water there would be some there. At high water there would be none of it there, where I lived, and only some of Scruggs' Island left at low water.*" R. 238-239.

He said he did not know whether Scruggs' Island was the same he leased from Mr. Learned. R 239.

When he leased from Mr. Learned at Newman's Towhead, he thought it was just the same ground as Scruggs' Island. R. 239.

Now as none of what he called Scruggs' Island, according to his statement, was left except in low water, and as Newman's Towhead was as high, or higher, than

the mainland, this could not have been Scruggs' Island, which was gone, except at low water. R. 239.

Comment:

He no doubt knew Tullos Island, or Island 98, called Scruggs' Island, when he went to Chotard in 1880.

While he said a part of this island had been there ever since he went there, further on he said the island where he put his hogs, which is the land in controversy, is Scruggs' Island. Asked whether Scruggs' Island disappeared, said: "Not all. A portion did. At high water there would not be none of it there. There would not be no land where I lived."

If this is true, at least all of the top part caved away. If the top part disappeared, so that none could be seen, except in low water, all the trees, willows and cotton wood, necessarily disappeared.

Towns was a roustabout on boats in which Capt DeLahunt was captain and pilot.

His testimony with all of its contradictions and uncertainties, certainly cannot outweigh the positive, clear and amphatic testimony of Capt. DeLahunt, that it entirely disappeared, there not being a vestige of it left, and that he ran steamers over the place where it had been.

Capt. DeLahunt passed this island six times per week, and often when he ran by with a raft or barge on account of narrowness at that point, had to flank his steamboat. Furthermore, it was a part of his business to watch bars, islands, cavings and all changes in the river, to enable him to navigate it with safety.

This witness, Capt. DeLahunt, is intelligent, and is now in the employ of the United States Government, as

pilot and captain of a boat, in the Second District, running out of Memphis.

Neither could Towns' testimony outweigh the testimony of Mr. Purnell, who lived on the Purnell Plantation of his father, in Mississippi, immediately opposite Island 98, from 1880 to 1897, and knew that it entirely caved away, he saw it all cave away.

Third: *William Miller's Testimony.*

Miller, another colored roustabout, was defendant's witness, and was born in 1875, and lived on Eustacia Plantation, of Major Higgins, in front of Island 98, from the time he could first recollect. It had about 250 acres. R. 302-303.

He could first recollect along in 1882, 1883 and 1884. R. 307. He was on the Island in 1882. R. 308.

Island 98 did not entirely disappear. The lower end all washed up. The upper end did not wash off. *There were 75 or 80 acres that did not wash off.* R. 303.

He was on Island 98 in 1882 and walked across to it from the Mississippi shore. Old man Joseph Scruggs lived on it. He moved from Eustacia Plantation in 1886. R. 308.

When he left Major Higgins' place, he went to Mr. Hamp Davis' place, called Brunswick, which is about eight miles *below* Chotard. R. 309.

He lived at Brunswick for ten years, or until 1896, but went up to Major Higgins' place every week. R. 310.

Between 1882 and 1896, the island did not cave much. the biggest part of the caving was in 1897. R. 310.

(This does not tally with defendant's theory that the channel went east of the Island prior to 1894, as it would have then ceased to cave.)

It caved on the outside and at the lower end. It caved a right smart on the lower end and sometimes big trees would fall in the river as it caved. R. 310.

Witness at first stated that the channel changed from the Louisiana side to the Mississippi side for a while; R. 314; but clearly misunderstood the question, as on the same page he said the change he was talking about was in 1912 or 1911, when the river broke through and cut off and left a big lot of land; and further said that after 1886, the river between Island 98 and the Mississippi shore, *except during high water, was not navigable for boats. The channel never did go there. It never did get so during low water that you could not walk from the Mississippi shore to the island.* R. 314-315.

He further said that when he said the channel changed he referred to the cut off about 1911, and that was the only change that he knew about, and there was no other change, except that. R. 316.

Comment:

The testimony of this witness for defendant, if believed, absolutely destroys the contention of defendant that the river came around east of Island 98, and that the balance of the property in dispute was added thereto by accretion.

While we think this witness wanted to state the truth, he left there and went to Burnswick, eight miles below, in 1886, and would not naturally observe the island as closely as Capt. DeLahunt, who passed it six times a week, as pilot and captain; nor would he observe it as closely as Mr. Purnell who lived immediately opposite the island from 1880 to 1897, and knew that it all disappeared.

Complainant maintains that the testimony of the eye witness clearly shows that Island 98 entirely disappeared.

Defendant's witness Miller testified that all of the island caved away except 75 or 80 acres.

Suppose, for argument only, it did not all cave away, will Mississippi also claim the accretion that made out from Louisiana and extended across to the island? Is it not certain that this would be Louisiana territory even if the island did not all cave away? However, we do not think there is any reason for the court to pass on this question, as it has been shown as clearly as it is humanly possible to show any controverted fact, that the island all washed away and disappeared.

Did Witness Mistake the Island and Bar North and West of Island 98 for Hopkin's Island?

Capt Chas. H. West:

Chart "H" also "Exhibit BB" shows Hopkin's Island as it existed in 1870, according to the survey which sectionized it as a part of Louisiana. R. 139.

At this time in 1870, the main shore line opposite Hopkins' Island was about 3000 feet further inland (on Mississippi side) than it was at the time of the Commission's survey of 1882, and a channel of the Mississippi River passed between Hopkins' Island and the main shore (of Mississippi) as it existed in 1870, as shown by "Exhibit BB."

After 1870, the river in the bend north of Willow Point began to move southwesterly, and built out the Mississippi shore a distance of about 3000 feet, so that in 1882, the Mississippi shore line was along what had been the

eastern boundary of Hopkins' Island, and the channel at that date was over the position occupied by Hopkins' Island in 1870, having destroyed all of the Island except a very small part of the southwestern extremity. R. 140.

Whether it was all destroyed at a slightly previous, or a slightly later date (than 1882) there is no history. * * * Witness hardly thought that the southwestern extremity was destroyed, because the river from 1882 on up to 1913, was moving eastward. R. 145.

E. T. Purnell.

He went on the sand bar (in Louisiana) west from Hopkins' Island. He knew Hopkins' Island in 1878 or 1879. It was northwest of Island 98. It was a northerly direction from the towhead, or sand bar (in Louisiana.)

He did not know whether any of it remained. R. 275.

A greater portion of Hopkins' Island was on the west side of the main channel. It may have gotten over on the east side. The river changed in there. The current changed at one time. It is possible that it could have been one way or the other. When he first knew Hopkins' Island the river was *on the Mississippi* side of it, along the east side: along the Mississippi shore. R. 276.

A stream of water went through between Hopkins' Island and the Louisiana shore—it was a good width and deep. R. 276.

Asked if it was a steamboat channel, said, "yes."

Witness was then shown "Exhibit," and pointed out the part marked thereon as "High Bar," written on the lower left hand corner of it were the words "1882 Bar Line," and he said, "that is what I have always known as Hopkins' Island. R. 277.

The witness said he was not much on maps. R. 261.

Comment:

The defendant claims this witness mistook for Hopkins' Island, what they were pleased to call Upper Tullos Island. While the witness was evidently confused in trying to interpret the map, the evidence clearly shows this contention of defendant *is not justified*, as the witness said when he first knew Hopkins' Island, prior to 1880, the main channel was east on the side next to Mississippi, though there was also a channel for steamboats on the west side of the island.

The survey of 1882 shows that the channel and High Bar, the witness pointed out as Hopkins' Island, was against the Mississippi shore, while the testimony of Mr. Marshall shows that in 1890, the chute between this bar or island in Mississippi was possibly 1000 feet wide. R. 175.

The fact is he was not familiar with maps, and mistook this High Bar for what he had known as Hopkins' Island. Besides Hopkins' Island, at one time, was nearly in the same location as the High Bar just a little west of it. As the witness said when he first knew Hopkins' Island, the river was on the Mississippi side of it, he could not have mistaken the High Bar for Hopkins' Island.

Capt. Jos. F. DeLahunt:

In speaking ofIsland 98, said, "We had to flank that place because it was very narrow between Hopkins' Towhead and Island 98." R. 292.

The channel ran between Hopkins' Towhead and Is-

land 98. He said it ran West of Island 98, East of Hopkins' Island, or Towhead. R. 293.

There was no channel West of Hopkins' Island. R. 299.

It never ran there in his time. (1880 to 1897.)

Hopkins' Towhead was West of Island 98. R. 300.

Comment:

Captain DeLahunt did not run in there until 1880, and the probability is that Hopkins' Island had disappeared; but if it did not all disappear, that what little was left had attached to Willow Point sand bar, and that he called Willow Point sand bar and Towhead, Hopkins' Towhead. In any event, the Towhead to which he referred, was on the Louisiana side of the channel, and he could not have been speaking of the Island or High Bar, which in 1882 and in 1890 was only separated from the Mississippi bank by a chute, possible 1000 feet wide during high water and dry in low water.

Lawrence Towns:

Went to the locality in 1880. There was Scruggs' Island and another we called Tom Hopkins'. R. 220.

He leased Newman's Towhead from Mr. Learned for six or eight years. R. 224-225-227.

This is the property in controversy.

He had 800 or 900 head of hogs on the property leased known as Newman's Towhead. R. 227.

He also said he had his hogs on (what he called) Hopkins' Island. R. 232.

He leased this property from R. F. Learned & Son, as property in East Carroll Parish, La., R. 226.

It is therefore certain that he referred to Hopkins' Island and Newman's Towhead as the same property.

If, between the years 1890 and 1894, the main channel was between Willow Point Bar, or Towhead, and the Mississippi shore, with no island intervening on the west side of the channel, then the judgment must be for complainant.

The question determinative of the issue in this case is, where was the channel between 1890 and 1894, with reference to Willow Point, and any islands on the Mississippi side of the river?

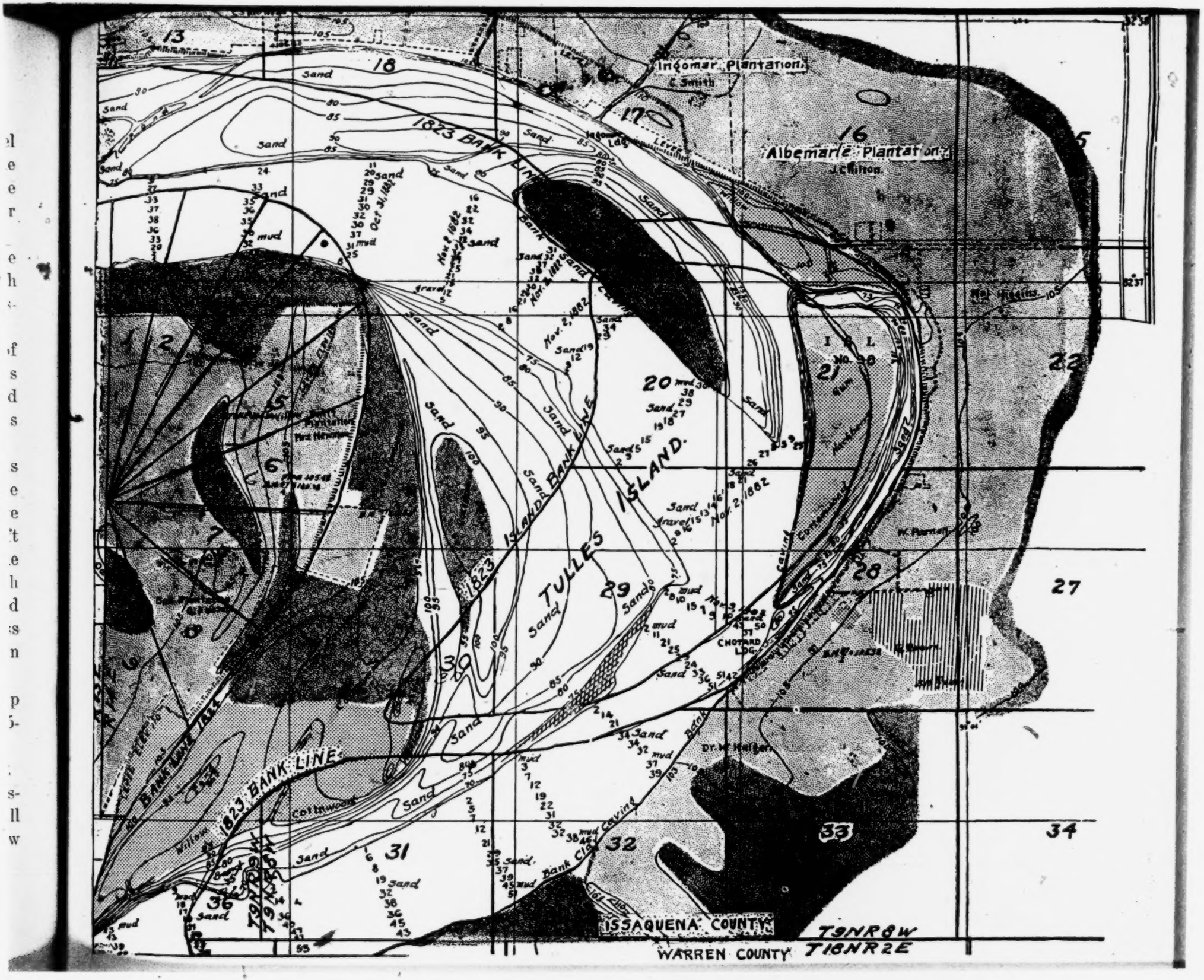
Mr. I. B. Beard (1876-1926) says: "It was East of Newman's Towhead on the Mississippi side. There was no island that he ever knew of between the towhead and the Mississippi shore." (Some of Tullos Island was there as late as 1890.) R. 89.

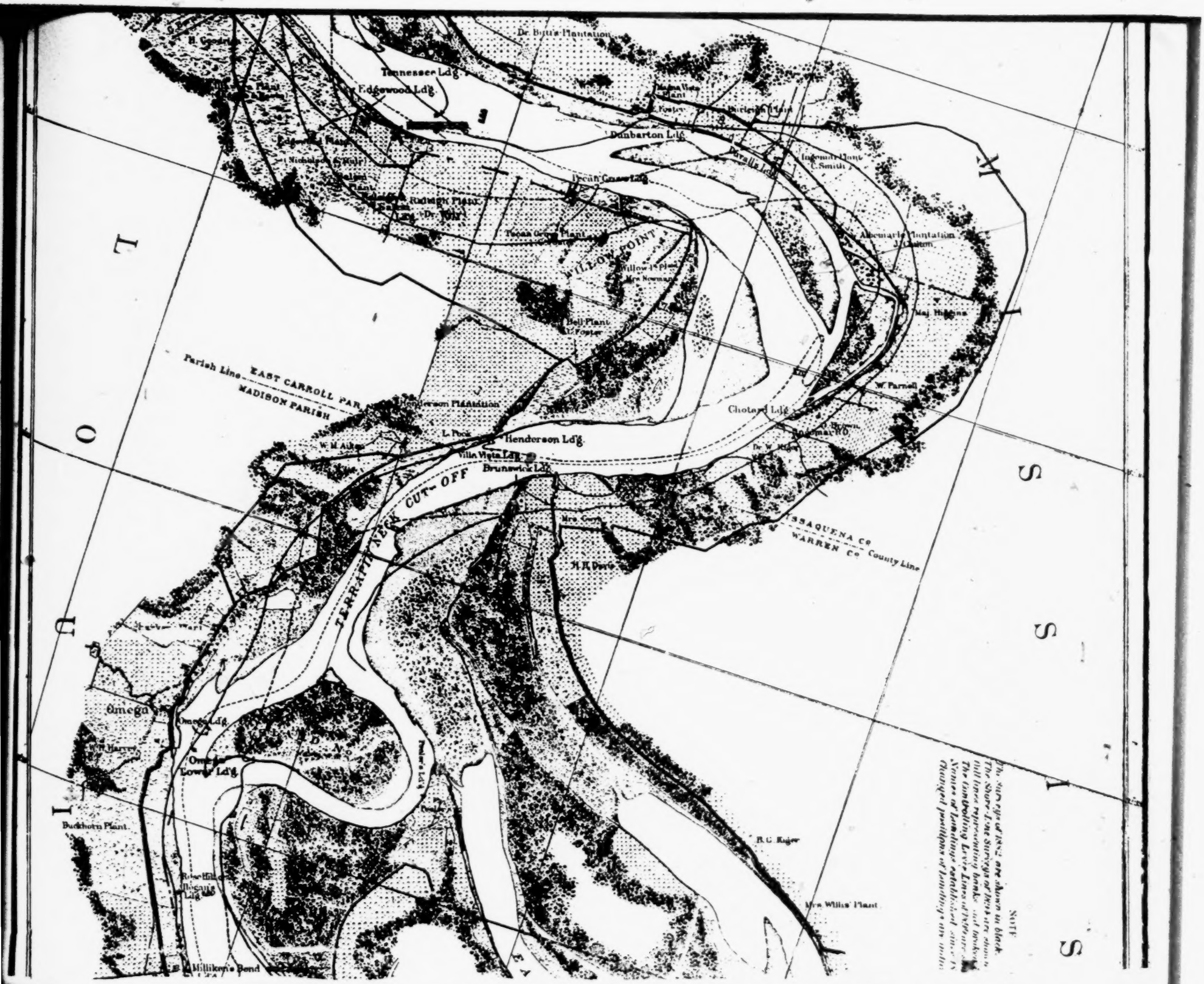
Comment: Some of Tullos Island remained as late as 1890, but this island did not jut out into the river; the river side of the island continued the bank line as above and below it, and the chute which made it an island left the river almost at right angles and returned the same way. Chart 1882) and was only 1000 feet wide in high water and dry in low water. Apparently Mr. Beard had not been across the river at that point; and from across the river there would be little appearance, if any, of an island.

E. T. Purnell, (1876 to 1897) says: "All the time up to 1897, the channel run East of the Towhead." R. 265-269.

And it was on the West side of the Island 98. R. 263.

Boats never did run between Island 98 and the Mississippi shore, except during high water, when small boats could run there. They could not do so in low water. R. 263.


Ingomar Plantation
C. Smith
Albemarle Plantation
J.C. Hilton
1823 BANK LINE
ISLAND
TULLES
Sand
mud
Gravel
Cotton Wood
Willow
Bank Clay
Levee
Canal
Dr. W. Hallam
CHOTARD LDG.
ISSAQUENA COUNTY
WARREN COUNTY
T9NR8W
T18NR2E



Map Mississippi River Commission of 1882, 1883. Showing Survey of 1894

Capt. Jos. V. DeLahunt (1880 to 1908), R. 289, said: "The channel was West of Island 98 and East of Hopkins' Towhead until Island 98 disappeared." R. 293.

Geo. R. Newman (1893 to 1897), said conditions at Willow Point first came to his attention in 1891. R. 81.

He was born on Willow Point—rode over the sand bar when a boy—pastured cattle on it. R. 66-81.

He never heard of Tullos Island. R. 73.

Asked if there were not three channels back in the nineties said, "No, there was not *but one channel* that he knew of." R. 75.

Witness further stated *there was no island there.* He knew positively there was no island there. The first island made there was the cut-off of 1912.

Defendant shows by its testimony that neither Tullos' Island, Island 98, or the Island above had entirely caved away in 1890. R. 173.

What Surveys and Maps Show

Complainant's "Exhibit M," being Chart 45 of the Mississippi River Commission, a small copy of which is attached to page 58 of defendant's brief and also inserted herein, showed that nearly all of Tullos' Island had caved away in 1882, the caving having been from the West side thereof, while "Exhibit C." which is a chart of the Mississippi Commission's survey of 1882, with the survey of the Mississippi River Commission of 1894, superimposed thereon in red lines, solid and broken, the solid representing the banks and the broken lines the edge of the bar next to the water, being Sheet 17 of the Mississippi River surveys, R. 138, shows that all of Island 98 and the bar, or island above had caved away

and was then in the channel, or covered by the bar and accretions from Louisiana, except a small part of the upper island, or bar, several miles northwest of Tullos Island, and this small piece which remained was adjacent to the Mississippi bank and not in controversy.

This argument is merely used to corroborate the positive testimony of the eye witnesses that all of Island 98, or Tullos Island, caved away and disappeared.

This fact is, therefore, established by both the eye witnesses and the surveys and plats.

Elevations Shown on Worksheets of Survey of 1894

Capt. Marshall testified to elevations shown on the worksheets of the survey of 1894. The highest point being 110, and various other elevations given. R. 172.

Attached to page 28 of defendant's brief is a map drawn by Capt. Marshall, marked Defendant's Exhibit 4 D, purporting to show said elevations. This map was not drawn by the engineers who made the survey of 1894, but is Capt. Marshall's deductions from the work sheets of the survey of 1894. The 110 elevation is shown on the southern section line of Section 17; other high points are in the NE 1-4 of Sec. 20, and NW 1-4 of Sec. 21, the western and southwestern part of Sec. 21, extending over into the SE 1-4 of Sec. 20. In the eastern part of Sec. 29, which is on the western side of the river channel of 1882, is shown an elevation of 100. Various elevations are shown in what he claims was the channel of 1882 in Sections 19, 20 and 29.

By reference to the survey of the Mississippi River Commission of 1894, shown on Sheet 17 of said surveys, being Complainant's Exhibit "C," R. 21-138-148-151,

and the testimony of Capt. West explaining same, it will be seen that the word, "accretions," marked thereon, covered parts of Sections 17 and 21, R. 155, these being two of the sections on which elevations are shown on Defendant's Exhibit 4-D.

These elevations could not have been on Tullos Island, as the evidence clearly showed Tullos Island entirely disappeared.

It will be noticed that in Sections 21 and 20 a good portion of what defendant claims as elevated land extended nearly one-third of the way across what Capt. Marshall claims in Exhibit 4-D was the river in 1882, and as the channel was on the Mississippi side of the river, this high ground noted by defendant was in the channel of the river, as it existed in 1882.

The evidence overwhelmingly shows that from 1882 to 1894, the Louisiana shore continued to extend east and northeast toward the island and above the island, and that the Mississippi shore receded substantially the same distance.

The testimony of defendant showed that in 1890, some of Island 98 and the island above it remained, and that the Mississippi River had not gone around east of Island 98, or the island above it, and the chute between said island was passibly 1000 feet wide. R. 173-175.

It is further the contention of defendant that at the time of the survey of 1894, the river had cut around behind these islands, and that the islands had made by accretions westwardly so as to connect with the Louisiana shore; and that the elevations shown were on the part of said islands that had never washed away.

It is impossible to maintain defendant's contention in

this regard. The elevation in the southeastern part of Section 20 extends into the channel of the river as it existed in 1882, and for defendant's contention to be correct, the river having gone around east of these islands, at some indefinite period between 1890 and 1894, it would be necessary in the intervening period, necessarily less than four years, for the old channel of 1882 to have not only filled up, but to have been raised to an elevation of over 100 feet, with willows and cottonwood growing on it. See Defendant's Exhibit 4-D, in the record, which is larger than the same exhibit in his brief.

It will be noticed that on defendant's Exhibit 4-D, attached to page 28 of its brief, in the eastern part of Sec. 29, and just west of the western section line of section 28, on the west side of what Mr. Marshall claims was the 1882 channel, an elevation of 100 is noted; this elevation is a little more than two miles from where said exhibit indicates that the channel of 1894 left the channel of 1882, on the north, being near the lower end of what defendant claims was the old bed of 1882, while at the upper end of this old channel the elevations noted are 86.6, 86.4, 86.6, 86.2, 86.9 and 90.6 feet, which is from 9.4 to 13.4 feet lower at the upper end of what is claimed to be the abandoned channel of 1882, than at the lower end.

It is a known fact, that the evidence shows same as well, that the Mississippi River is a silt bearing stream. The evidence shows that the abandoned channel, caused by the cut-off of 1912-1913, at the upper end thereof, had so filled by 1916, that boats could not pass through it even during high water, while the lower end of the abandoned channel for a considerable distance was still open

and water therein, at the time the testimony was taken in 1926, thirteen years after the cut off.

The reason, as is well known, is that when the current slackens, the silt deposits, and it naturally deposits first at the upper end of an abandoned channel, and as soon as the elevation is as high as the adjacent bank, the deposits are no greater there than anywhere else along the banks of the river.

These physical facts indicate that defendant is mistaken in saying that prior to 1894 the channel was abandoned, but they strongly support the testimony of complainant's eye witnesses that the channel was never abandoned until the cut-off in 1912-1913; and that the Louisiana 1882 bar line continued to extend in an easterly and northeasterly direction until the cut-off of 1912-1913, all of which is shown by the plat of survey of the Mississippi River Commission of 1894.

By referring again to defendant's Exhibit 4-D, shown at page 28 of defendant's brief, it will be seen that the Louisiana 1882 bar line need only have extended approximately three-fourths of a mile to have covered the location of the 110 elevation, and all other elevations, as shown on said exhibits, and as the time within which this could be done was from 1882 until a little before 1894, there was a period within which this could be accomplished, of from ten to twelve years.

The caving of the Mississippi shore had been *very rapid* from the time of the 1882 survey by the Commission, up to the time the *cut-off* was made. R. 141.

The river was narrow and deep, and maintained about the same width. R. 144-155-157.

Captain Marshall, the witness for defendant, who

made most of the maps, relied upon by defendant, says he adopted the same rule as Capt. West, "to allow the usual width of the river." R. 181.

It would follow that if the river approximately maintained its width, that the Louisiana bank advanced by accretions, correspondingly as the Mississippi shore receded by erosion.

Mr. Albritton testified that the largest timber would probably be in Lots 3 and 4 of Section 21. R. 250.

Now, while this might be so, it will be seen there were no surveys introduced in the record.

Mr. Albritton said one was made in September, 1924, by Wm. Hull, of Rolling Fork, Miss., whom he did not even know to be a licensed surveyor. R. 257.

Mr. Albritton, who is interested in this litigation, neither introduced the survey in evidence, nor did he call the surveyor as a witness, so that he could have been cross-examined.

Plaintiff believes this sort of testimony will not appeal to the court.

The Mississippi River Commission was created by Act of Congress of (June 28th, 1879, C. 43, Sec. 1, 21 Stat. 37. See Comp. Stat. 1918, Sec. 9993.)

The Commission made a very comprehensive and complete survey of this reach of the river in 1882, and has been actively engaged there ever since.

If between 1890 and 1894, the river had cut around east of Island 98, and the Island adjacent, so as to make two channels of the river at that place, there would be some history of it in the records of the Mississippi River Commission. Its surveys contradict such theory, and

clearly show that defendant's contention is incorrect. Especially is this shown by the survey of 1894.

If the channel had cut around east of said Mississippi Islands, between 1890 and 1894, some of the witnesses who lived on the banks of the river adjacent the point in controversy would have known about it, while there is not a witness who positively swears to such fact.

For the theory of defendant to be correct, the channel as it existed, *not in* 1882, but after 1890, at the time defendant claims it changed to the east of said Mississippi Islands, between 1890 and 1894, would necessarily have filled up and have had willows and cottonwood growing upon it, all within some indefinite period of time, but necessarily less than four years.

The fact is such is a mere theory of defendant, which is overwhelmingly contradicted by the eye witnesses, the government surveys and the physical facts.

Capt. Reed was familiar with the Willow Point place since 1894 and said, "between the towhead and the old timber line there was a depression of white sand, and I think in extremely high water very small boats could go through this depression. That it passed between what was known as Newman's Towhead and the mainland of Louisiana." R. 107.

The fact was also testified to by other witnesses.

Defendant claims this depression was in the location of the 1882 channel. Complainant does not know about this; but whether it is, or is not, cannot help defendant's theory, for this reason: defendant's testimony makes certain the fact that if the river went around east of Island 98 and the island adjacent, it necessarily did it between 1890 and 1894. All of the testimony in the re-

cord shows that from 1882 to 1912 the Louisiana shore was rapidly extending by accretion and the Mississippi shore rapidly receding by erosion, therefore if the river did go eastward around Island 98, and any other island, after 1890 and before 1894, the abandoned channel *could not possibly be in the same location as* the channel of 1882, as it had moved a great distance to the east during the years from 1882 to said indefinite time between 1890 and 1894, when defendant claims it went around east of Island 98. The channel of the river at the time it went east of the island, if it did so, must have been more than a mile east of where it was in 1882.

It is certain that the depression between Newman's Towhead and the Louisiana shore, is not and could not be the filled up abandoned bed of the river as the bed existed at the time defendant claims the channel passed around east of Island 98, and adjacent bar, or island, for the reason shown that such abandoned channel, if there ever was such, would necessarily be at least a mile east of the location of the channel of 1882.

All the testimony shows that immediately east of the depression between Newman's Towhead and the Louisiana shore was Newman's Towhead, which was practically as high as the main land, with cottonwood and willow upon it.

This high ground would necessarily be in the location, or a part of the location where the abandoned channel was, as claimed by defendant, at the date of the abandonment in the indefinite period, between 1890 and 1894, and this is impossible, as the channel could not have filled and had *trees* on it within such short time.

The very fact that defendant cannot fix any date when

such abandonment occurred, that no one positively so swears, that many swear such did not occur, that no river chart shows such, that no civil engineer knew of such, and that the Mississippi River Commission had no such knowledge, is strongly persuasive that such never occurred.

Defendant has based its defense upon theories, which when tested by facts are shown to be without foundation, and not such as a court could base a judgment upon. Besides, if defendant sets up an avulsion, should it not prove such special defense.

Physical Facts

It is shown that the territory involved is in the Delta, or alluvial sections of Louisiana and Mississippi, and the evidence showed that the main banks, when the current was against them, washed away by erosion with great rapidity, whole plantations caving into the river, in a very short time.

Any islands formed in the river, or added to, or built larger by silt from the river, would likewise disappear with great rapidity when the channel and current was thrown against them.

The channel was thrown against Island 98, or Tullos Island, sometimes called Scruggs' Island, and also the Island or High Sand Bar adjacent to Island 98, and extending northward, with all of its force, and they would disappear just as fast as the main bank.

Originally, most of the channel was against the lower and western part of Island 98, but as the caving took place northwest of Willow Point, the channel struck Island 98 higher and higher and as it then went on up

against any islands, or bars above it, would it not wash all out of its way, leaving no islands at all at the point in controversy.

It will be shown by "Exhibit BB," showing Hopkins' Island, that no Island or High Sand Bar is shown adjacent and above Island 98.

It is also shown by the testimony of Capt. West, that after 1870 the river above Willow Point began to move in a southwesterly direction, until it cut into Louisiana shore about 3000 feet, and that the Mississippi shore built out about 3000 feet. R. 140.

This is doubtless the period when the High Bar north of Island 98 built up, as this bar is shown to have been there in 1882.

After 1882, the river moved eastward until 1913. R. 145.

When the river again swung east, at this point, this High Sand Bar, or Island above and adjacent to Island 98, would naturally be swept away.

In addition to the above arguments, complainant now calls attention to some statements in defendant's original brief:

On page 12 thereof, defendant said that from 1823-1824, the time of the original survey, to the survey of 1882, shown in Chart 45 of the Mississippi River Commission, no survey was made. (This is error—it is shown there was a survey in 1866 and 1870.)

The witness, Capt. C. H. West, superimposed on said Chart 45, the surveys of 1823 and 1824. (This is shown on Complainant's "Exhibit M," attached to page 12 of defendant's brief.)

Defendant said that this shows that from the dividing

line of Secs. 4 and 5, little or no change occurred, (that is between 1823 and 1882) but that the river had changed to the eastward, in front of Section 7, approximately one and a half miles.

It will be noted that defendant has attached this exhibit to his brief to sustain his argument, and therefore relied upon it as evidence for that purpose.

An examination of this Chart will show that from 1823 to 1882, there was no change at all in the boundary in front of the center of Section 4, which is a part of the Willow Point property.

This destroys the contention, or suggestion that there might have been an avulsion at such time between 1823 and 1882, which left a part of Mississippi territory on the Louisiana side.

As there was no change in the boundary at this point, it would have been impossible for Mississippi territory to have come over to the Louisiana side, and then for an avulsion to have occurred through Mississippi territory, as set out in the first contention of defendant, and this fact renders that contention of defendant a physical impossibility. This amounts to an admission of defendant that its first defense must fail.

Defendant admitted on page 46 of its brief that the boundary line of 1882 between Mississippi and Louisiana was marked on Charts 45 and 36 of the Mississippi River Commission, the same being the middle of the river between Willow Point and Tullos Island, (as it then existed.)

Comment:

If this is true, it should settle the question that all

land on the West side of the channel, as it existed in 1882, was Louisiana territory.

We now call the Court's attention to some additional facts bearing on the second contention of defendant that the Mississippi River cut around North and East of Tullos Island, and that the territory in question is accretions to Tullos Island.

Defendant complains on page 47 of its original brief, that "Exhibit I," made from Sheet 17 of the Mississippi River Commission Plats, showing the survey of 1894, is not correct.

We presume, however, that defendant will not say that the plat itself, of said survey of 1894, superimposed by the Mississippi River Commission, on the Chart of 1882 is not correct; and the superimposed plat of this survey of 1894, made by the Commission is what Complainant relies upon, and that shows that Tullos Island, and any other island in the vicinity, had entirely disappeared at the time of said survey for 1894. The Louisiana bar line is shown on this Chart in broken red lines. This plat is the contsruction of the Mississippi River Commission as to what its own survey of 1894 showed. The Commission which made the survey, ought to know better what its survey showed, than the theory of Capt. Marshall devolved thirty-two years later.

Defendant, in its original brief on page 68, says that the testimony is undisputed that in 1893 both islands were in existence, with trees growing on them.

Comment:

Complainant thinks this is true as to the early part of 1893, but believes both islands caved away either during

the high water in the spring of 1893 or 1894, as they were gone entirely at the time of the survey in 1894.

The above contention of defendant, however, amounts to a confession on the part of defendant that its second contention that the river had cut around North and East of Tullos Island cannot be maintained, for the following reasons:

In 1894, it is certain there was only one channel and no island between Willow Point and the Mississippi shore. See testimony of Captain Reed, R. 110, Geo. R. Newman, R. 74 and I. B. Beard, R. 95.

If defendant's contention was correct, the river would necessarily have abandoned its old channel between 1893 and 1894, and there would necessarily have been two channels in 1894, and the evidence shows that such did not exist.

Again, the abandoned channel must have filled up and had trees growing upon it within the period of a year.

Again, it is comparatively a recent date since 1894, and had such facts as defendant claims taken place, it could have produced plenty of witnesses to show same.

When a litigant can get evidence to show a fact, if it existed, and he does not produce such evidence, the presumption is such evidence does not exist.

The river was navigated at this time by numerous steamboats, and had two channels existed all of the captains and steamboat pilots would have known thereof.

Again, the Mississippi River Commission was created in 1879, and was actively engaged in surveys in this stretch of the river, and had two channels existed at this point, they would have known something about it, their

records would have shown same and such fact could easily have been established.

The fact that no steamboat captain, or pilot, nor the Mississippi River Commission knew of the existence of such fact, and that their records, or charts do not show same, shows that such fact did not exist.

The only witnesses who knew of this territory, as far back as 1894, introduced by defendant, were one white man and two negroes. The white man was Mr. R. E. Foster; and while complainant thinks he wished to tell the truth as far as he knew it, he knew very little about Tullos Island in recent years, which complainant has already shown in its briefs, by specific reference to his testimony, which will not here be repeated, except that he finally admitted that Tullos Island he was talking about, was exactly West from his place and across the river from it, and that he knew the island was there by seeing the trees upon it, and finally admitted that the trees he saw may have been on the Louisiana bank.

The negroes defendant introduced, were Towns and Miller, and complainant refers the Court to Towns' testimony as shown in the record, and thinks it can say without any fear of contradiction, that no court will attach any importance to his testimony.

Complainant calls the attention of the court to the fact, however, that while Towns' testimony was that all of Island 98 did not disappear, that he could not see any of it except in low water, and if that is true, at least all of the surface and timber on said island disappeared.

The other witness that defendant introduced to show that all of Island 98 did not disappear, was William Miller, and while he testified that seventy-five or eighty

acres of the island remaided, he said the channel never did run between the island and the Mississippi shore, and this testimony of their own witnesses, destroys the contention of defendant.

Captain Marshall had not been at this point since 1890 and could not testify from personal knowledge about it, and his testimony was mere theories, principally based on the work sheets of the surveys of 1894.

Such uncertain and unsatisfactory testimony as defendant has introduced to show its two contentions, cannot outweigh the positive testimony of complainant's eye witnesses that Island 98 entirely disappeared, and that there never was but one channel at this place, and that no island existed after 1894, at the point in controversy between Willow Point and the main Mississippi shore, at Albemarle Bend; nor can it contradict the positive showing from the plat of survey of 1894, made by the Mississippi River Commission; nor can it contradict the physical fact that the river would not sweep East by these alluvial islands, without washing them away.

Twenty Reasons Why Judgment Should Be For Complainant

Complainant gives the following as some of the reasons established by a preponderance of the evidence, why judgment should be rendered in its favor:

1st, It is shown that the accretions to the Louisiana shore, at the point involved, were continuous from the time of the survey by the United States Government in 1824 to the date of the avulsion in 1912-1913.

2nd. That during the same period the Mississippi shore receded correspondingly by erosion.

3rd. That after the boundary line between complainant and defendant had thus moved in an easterly direction, some five miles, an avulsion occurred in 1912-1913, through the Louisiana accretion, thus leaving Louisiana territory a part of the territory in question, on the eastern side of the river.

4th. That there never was any avulsion, other than the one of 1912-1913.

5th. That the banks of the river on both sides, as well as islands, were alluvion and when the current was directed against same, cut away very rapidly.

6th. That Tullos Island, or Island 98, entirely disappeared.

7th. That the channel at all times was west of Island 98 until it disappeared entirely, and was on the Mississippi side of the river at this point.

8th. That the timber on Island 98 was timber that grows on older soil, such as gum, hackberry, and cottonwood, one tree being 7 or 8 feet through.

9th. That the timber on Newman's Towhead, *being the property in dispute*, was principally cottonwood and willow, being such growth as appears on newly made soil in the Mississippi River.

10th. That the timber on the original land at Willow Point included sycamore, gum, elm and pecan, which usually grows on older soil, and being the same character of timber as was on Island 98.

11th. That Willow Point and Newman's Sand Bar, on which the Towhead later formed, existed at the same time as Tullos Island, and that they were on opposite sides of the river and could not be the same property as contended by defendant.

12th. That only one channel existed at the point in controversy prior to the 1912-1913 cut-off.

13th. The river at this point was about two-thirds, or three-fourths of a mile wide. It was wide and deep, and *maintained* about its same width, and as the Mississippi shore receded, the Louisiana shore necessarily extended, for the river to maintain its same width.

14th. That between 1882 and 1894, until Tullos Island entirely disappeared, the channel was always west of said island, with the current against the west side thereof, which was caving and could not be added to by accretions.

15th. That the channel until the cut-off in 1912-1913, was always east of Willow Point Bar, between that and the Mississippi shore, with no island of Mississippi, west of channel, intervening.

16th. That at the point in controversy, Louisiana is on the convex side and Mississippi on the concave side. The channel and the caving is always on the concave side, and the accretions are made to the convex side.

17th. That the Mississippi River Commission considered the land in dispute to be Newman's Tow-

head and not Tullos Island, or Island 98, or any other island in Mississippi, and therefore marked on Chart 47, being a survey of 1913-1915, made after the cut-off of 1912-1913, the words, "Newman's T. H." On the map of this Chart, made by defendant's witness, Capt. Marshall, in defendant's brief, page 16, appears in writing the words, "Tullos Island." These words are not on Chart 47 of the Mississippi River Commission, but have been placed on defendant's map by some one with pen and ink apparently; also referring to what purports to be a copy of work sheet of the survey of 1894, where appears the word, "Willows" on the original, indicating small growth. Capt. Marshall has, on his purported copy, changed the word to "timber."

18th. That Walter R. Newman owned Willow Point Plantation. The Bar attached was called Newman's, as it belonged to the owner of Willow Point Plantation, and the Towhead formed thereon was also called Newman's Towhead for the same reason. This shows that the people, the river men, as well as the Mississippi River Commission, considered the property in question to be Newman's Towhead.

19th. Had defendant's contention been correct, there would have been two channels at the point in controversy, in 1894, but the Chart of the Mississippi River Commission of 1894, superimposed on the Chart of 1882, shows only one channel, and where the second one must have been for defendant's

contention to be correct, shows the bar from the Louisiana shore, extending entirely out to the only channel that existed.

20th, That Mississippi has never exercised sovereignty and jurisdiction over the property in dispute, but Louisiana had actual possession.

Complainant asks for judgment in its favor as prayed for.

Respectfully submitted,

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